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No. 04-1084

IN THE

Supreme Court of the United States

GONZALES,

Petitioner,

v.

O CENTRO ESPIRITA BENEFICIENTE UNIAO DO VEGETAL, *ET AL.*

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE BAPTIST JOINT COMMITTEE, THE NATIONAL ASSOCIATION OF EVANGELICALS AND OTHER RELIGIOUS AND PUBLIC POLICY ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

This brief will address the following question, which is fairly subsumed within the question presented in the Government's petition: May the Government satisfy the "compelling interest/least restrictive alternative" standard that Congress enacted in the Religious Freedom Restoration Act simply by asserting, without case-specific evidentiary support, a compelling interest in the uniform enforcement of the law, and then arguing, tautologically, that a policy of denying any religious exemptions is the least restrictive means of furthering that interest?

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INTERESTS OF AMICI CURIAE

Amici are a diverse group of churches and other religious and public policy organizations that supported enactment of the Religious Freedom Restoration Act ("RFRA") and wish to ensure that it remains the potent protection for religious freedom that Congress intended it to be.

Like most Americans, *amici* are concerned with the problem of abuse of dangerous drugs. But the issue in this case is not whether the goal of curbing that abuse is an important one in the abstract. Nor is it whether the Respondents here—a small denomination and its leaders whose worship involves the use of small amounts of a controlled substance—should ultimately prevail on their request for a limited religious exemption under RFRA. The issue, instead, is whether the Government can effectively be excused from making the showing that RFRA requires before it imposes a burden on religion, *i.e.*, by proving that the application of that burden "to the person" is the least restrictive means of furthering a compelling government interest.

Here, the Government's legal theory would allow it to evade the statutory requirement through what amounts to a tautology. The Government asserts that it has a compelling interest, not in enforcing the Controlled Substances Act ("CSA") against Respondent specifically, but in the "uniform enforcement" of the laws. Pet. Br. at 17. The Government then argues that only a policy of re[illegible]ing *all* requests for religious exemptions can be the leas. restrictive means of furthering that objective. *Id.* The Government thus conflates both elements of the strict scrutiny analysis into a single inquiry that foreordains victory for the Government. To make matters worse, the Government argues that it should be allowed to satisfy both requirements on the basis of speculation—or general congressional findings—rather than

hard *evidence* of any harm that would result from allowing the limited religious exemption sought here.

Amici believe the Government's approach would largely destroy RFRA as a meaningful constraint on the application of federal laws to override religious rights and interests. That, in turn, would deprive *amici*, their members, and all people of faith of the important protection for religious liberty that RFRA has heretofore provided. That approach would enfeeble other statutory and constitutional protections that rest upon similar formulations of strict scrutiny.[1]

STATEMENT

The Religious Freedom Restoration Act provides that the federal government may not impose a "substantial burden" on a person's religious exercise unless the Government demonstrates that "application of the burden to the person" "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). The Government concedes that it would impose a substantial burden on respondent O Centro Espirita Beneficiente Uniao Do Vegetal ("UDV") to prohibit it from importing hoasca for use in UDV religious ceremonies. Indeed, prohibiting members of UDV from ingesting sacramental hoasca tea would destroy the central ritual act of their faith. The only issue here is whether the Government met its obligation to justify the burden on UDV by demonstrating a compelling interest pursued by the least restrictive means.

[1] A complete list of *amici*, with descriptions of each organization's interest in this litigation, is presented in a more detailed Statement of Interest of *Amici Curiae* appended to this brief. Petitioners and Respondents have consented to the filing of this brief in letters that are being filed with the Clerk's office. The undersigned counsel alone have authored this brief, and no person or entity other than *amici* or their counsel has made a monetary contribution to its preparation or submission.

In the Court of Appeals, the Government argued that it had a compelling interest, not only in enforcing the Controlled Substances Act, but in enforcing that law *uniformly*. *See O Centro Espirita Beneficiente Uniao Do Vegetal* v. *Ashcroft*, 389 F.3d 973, 1029 (10th Cir. 2004) (McConnell, J., concurring) ("the government … stresses its interest in uniform enforcement of the law and avoiding the burdens of case-by-case management of religious exemptions …."). The Government also relied upon legal arguments rather than admissible evidence in arguing that granting a religious exemption to the UDV would seriously harm the Government's interests and, thus, that only a policy of denying all religious exemptions could adequately further the Government's purposes. *See id.* at 982-83 (plurality opinion). For the reasons discussed below, the Government's arguments fall short of what Congress required in the Religious Freedom Restoration Act.

SUMMARY OF ARGUMENT

Although the Government tries to limit the potential impact of its legal theories on other cases, in fact those theories would pull the heart out of the Religious Freedom Restoration Act, which Congress enacted to ensure that believers of *all* faiths may worship and practice their religions without unnecessary restriction from federal laws and regulations. Specifically, in enacting RFRA, Congress determined that the "inalienable" right of free exercise of religion (42 U.S.C. § 2000bb(a)(1)) should include the right to exercise one's faith even in the face of generally applicable laws, and that this right, although not absolute, should be given great respect by the federal government. Put differently, Congress wished to ensure that its own enactments would not be construed or applied to restrict religious conduct substantially, except in cases of necessity. Congress also determined that, to ensure that the religious exercise of all faiths would receive similar consideration, the standard of protection should be stated in

general terms that can then be applied to the relevant circumstances of each case.

Congress crafted the terms of RFRA to achieve these purposes. Accordingly, whenever the federal government imposes a substantial burden on religious exercise, RFRA requires the Government to prove that application of the burden furthers a compelling governmental interest and does so by the least restrictive means.

This standard applies even when, as here, the religious exercise is the use of a controlled substance as the central sacrament of a sincere religious ritual. It is unquestioned that in prohibiting the importation of hoasca tea and threatening members of the UDV with criminal prosecution, the Government threatens to destroy the UDV's religious worship as it now exists–tantamount to banning the wine consecrated at a Roman Catholic Mass or the unleavened bread at Passover Seder. RFRA demands a strong showing of public necessity to justify such a severe burden on religious practice.

The Government's challenges to the UDV's request for an injunction conflict with RFRA's text and logic and, if accepted, would seriously undercut the statute's purpose of protecting the religious conscience of all faiths. Indeed, the Government's approach is fundamentally misguided for two reasons.

First, as RFRA's plain language provides, the Government must establish that it has a compelling interest in applying the law in question "to the person"—that is, to the claimant's *own* particular religious conduct—not merely a compelling interest in the law in general. Requiring the Government to prove the need for regulating the individual claimant is crucial if RFRA's protections are to be meaningful. Indeed, without such a requirement, the "compelling interest/least restrictive alternative" analysis becomes a tautology: The Government can always claim (despite its present attempt to limit this case to illegal drugs) that it has a "compelling interest" in the uniform application of the law, and on that basis establish that

a policy of denying all religious exemptions is the "least restrictive means" of furthering that interest.

Thus, in this case, the Government cannot meet its burden merely by contending that the Controlled Substances Act requires uniform enforcement. Rather, the Government must show a compelling interest in prohibiting the importation and use of hoasca in the specific context of the UDV's rituals. As a corollary, the Government may not simply rely on generalized congressional findings about a controlled substance but must "demonstrate," with real evidence, that the substance poses compelling dangers in the context of the sacramental use. Although the Government may ultimately be able to make such a showing here, it failed to do so in two weeks of trial and now claims that it is not required to do so.

Second, given the stringency of the compelling interest test, the Government must prove that the harm to the governmental interest from the claimant's religious exercise will be serious and likely, as shown by concrete evidence rather than speculation or even general congressional findings. That is why the district court was correct in requiring the Government to show that the UDV's use of sacramental hoasca tea would create "serious risks of harm" to its members or "a significant risk of diversion to non-religious uses." Given the district court's finding that the evidence concerning these harms was merely "in equipoise," the courts below properly held that the Government had not met its stringent burden.

ARGUMENT

The compelling interest test employed in RFRA is a rigorous test. Although it is not absolute, it institutes "the most rigorous of scrutiny," one that many government actions will fail. *Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 546 (1993). The Government's arguments that it has established a compelling interest here

fly in the face of both the text and the purposes of RFRA. They would undermine the statute and should be rejected.[2]

I. RFRA Requires the Government to Demonstrate A Compelling Interest In Restricting The UDV's Use Of Hoasca In Particular, Not The Use Of Hoasca Or Other Drugs Generally.

In the proceedings below, the district court held a two-week trial and issued an extensive, carefully reasoned opinion. The court concluded that the limited use of hoasca tea in UDV religious ceremonies was not sufficiently subject to abuse that prohibiting such use was the least restrictive means of furthering a compelling interest, as RFRA requires.

The Government, however, contends that the courts should not undertake any such inquiry–that once a substance is listed on Schedule I, RFRA permits the Government to restrict it regardless of any evidence concerning the circumstances of its use. The Government asserts an interest "in uniform enforcement of the [drug laws]" that it claims cannot "co-exist with judicially implemented religious exemptions." Pet. Br. 16, 22. Similarly, the Government asserts that Congress's *general* findings concerning dimethyltriptamine (DMT) as a controlled substance are conclusive against any RFRA claim for an exception from the CSA for a particular sacramental use. *Id.* at 15-16. As shown below, the Government's position flies in the face of RFRA's text and purpose and threatens to undermine the protections the Act was designed to provide.

[2] We note that the Government seeks at the outset to avoid shouldering any obligation of proof whatsoever on the RFRA claim; it tries to assert that the plaintiffs bear the burden of proof on the compelling interest test because they bear the burden under preliminary injunction law of showing a likelihood of prevailing on the merits. Pet. Br. 12. We agree with the other briefs that have shown at length why this argument is specious. *See, e.g.*, Resp. Br. at 52-55; Br of Douglas Laycock as *Amicus Curiae* at 5-14.

A. RFRA's Plain Language And Purposes Demand That The Government Justify Each Challenged Application Of A Generally Applicable Law.

Under RFRA, the Government must show its compelling interest, not with respect to the statute or program as a whole, but with respect to the particular religious conduct in question. RFRA by its terms requires the Government to prove that the "application of the burden to the *person*"[3] is the least restrictive means of serving a compelling interest. 42 U.S.C. § 2000bb-1(b) (emphasis added). Put differently, the Government cannot satisfy its obligation by showing that repeal of the rule as a whole would contravene compelling needs; it must meet the much more difficult task of showing that an exemption would create such problems. *See* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 222 (1994). The statute therefore required the district court to look beyond Congress's general designation of DMT as a controlled substance and to take evidence concerning the UDV's specific use of sacramental hoasca tea in the limited context of its worship ceremonies.

1. This conclusion is strongly confirmed by RFRA's history and structure. First, RFRA's text expressly invokes and incorporates decisions of this Court that rejected governmental attempts to satisfy the compelling interest standard by relying on the general purpose of the law in question. The clearest example is *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), which contained the analytical framework that RFRA adopts as its model. *See* 42 U.S.C. § 2000bb(b)(1) (purpose of RFRA is "to restore the compelling interest test as set forth in [inter alia] *Yoder*"). In *Yoder*, where Amish

[3] Lest there be any doubt, "unless the context indicates otherwise," the word "person" in any Act of Congress, includes "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals," 1 U.S.C. § 1, and thus includes UDV as well as the individual plaintiffs.

parents objected to state law insofar as it required them to send their children to school after age 14, the Court accepted the premise that education in general was a "paramount" state interest. 406 U.S. at 213. But it added that "[w]here fundamental claims of religious freedom are at stake, we cannot accept such a sweeping claim; *despite its admitted validity in the generality of cases*, we must searchingly examine the interests that the State seeks to promote . . . and the impediment to those objectives that would flow from recognizing *the claimed Amish exception*." *Id.* at 221 (emphases added). The Court therefore examined, rather than ignoring, the extensive trial record on the social and educational practices of the Amish. *Id.* at 221-29. Concluding that the evidence showed that exempting Amish teenagers from the last two years of formal schooling would not pose any "substantial threat to public safety, peace or order" (*id.* at 230 (quoting *Sherbert* v. *Verner*, 374 U.S. 398, 402-03 (1963))), the Court barred enforcement of the requirement against the Amish. The Court concluded that "it was incumbent on the State to show with more particularity how its admittedly strong interest . . . would be adversely affected by granting an exemption *to the Amish*." *Id.* at 236 (emphasis added).

Likewise, in *Sherbert* v. *Verner*, 374 U.S. 398 (1963)–the other decision that RFRA explicitly incorporates (42 U.S.C. § 2000bb(b)(1))–this Court held that no compelling interest justified the denial of state-provided unemployment benefits to persons whose religious convictions prevented them from working on Saturdays. The Court found that the record did not "appear to sustain" the state's prediction that providing such benefits would encourage "fraudulent claims" and "dilute the unemployment compensation fund." *Id.* at 407. As in *Yoder*, the inquiry focused on the particular circumstances of the claimant, a Saturday worshipper. The Court said that it was not "declar[ing] the existence of a constitutional right to unemployment benefits on the part of *all* persons whose religious convictions are the cause of their

unemployment." 398 U.S. at 409-10 (emphasis added). Instead, the Court was simply focusing on one narrow category of claimants and the impact of an exemption limited in *their* favor. *See also Thomas* v. *Review Board*, 450 U.S. 707, 719 (1981) (under *Sherbert*'s compelling interest test, "the focus of the inquiry [must be] properly narrowed").

The claimant-specific approach is also confirmed by RFRA's textual requirement that application of the burden to the person be "the least restrictive means" of achieving the Government's interest. If exempting the person from the burden will not seriously compromise the asserted compelling interest, then exemption is a less restrictive means of achieving that interest. Likewise, the legislative history confirms that the compelling interest standard "should be interpreted with regard to the relevant circumstances in *each* case." COMM. OF THE JUDICIARY, S. REP. NO. 103-111, *reprinted in* 1993 U.S.C.C.A.N. 1892, 1898 (emphasis added).[4]

[4] Other lower court decisions agree with the Tenth Circuit's conclusion here that the compelling interest test must be applied to the individual claim rather than the general statutory scheme. *See, e.g., Kikumura* v. *Hurley*, 242 F.3d 950, 962 (10th Cir. 2001) ("[U]nder RFRA, a court does not consider the [law] in its general application, but rather considers whether there is a compelling government reason, advanced in the least restrictive means, to apply the [law] to the individual claimant."); *Jolly* v. *Coughlin*, 76 F.3d 468, 478, 477 (2d Cir. 1996) (requiring state prison under RFRA to "demonstrat[e] that the decision to continue *the plaintiff's* confinement to keeplock furthers a compelling state interest," and rejecting prison's assertion of "a broader compelling state interest *in administering an effective mandatory TB screening program*")) (emphases in original); *cf Murphy v. Missouri Dep't of Corrections*, 372 F.3d 979, 988-89 (8th Cir. 2004) ("The threat of racial violence is of course a valid security concern, but to satisfy RLUIPA's higher standard of review, prison authorities must provide some basis for their concern that racial violence will result from any accommodation of CSC's request."); *Warsoldier v. Woodford*, No. 04-55879, 2005 WL 1792117, *6-7 (9th Cir. July 29, 2005) (granting inmate injunction where prison could not show its hair grooming policy was the least restrictive means to meet compelling interests—security, health, and identification—where inmate was in a minimum security facility); *Stuart Circle Parish v. Board of Zoning*

2. Requiring the Government to prove a compelling interest "at the margin"[5]–in other words, a compelling interest in applying the law to the claimant in question–is also crucial to the achievement of RFRA's purposes. Congress clearly stated that it wished to protect religious freedom vigorously while also respecting the societal needs underlying other federal laws: that is, to "strik[e] sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. § 2000bb(a)(5). A claimant-specific approach to determining the availability of a religious exemption is the only way to allow sincere religious believers to practice their faith while still allowing the Government to apply its law and secure its interests in the vast majority of cases.

Indeed, if it were sufficient for the Government merely to assert an interest in the "uniform enforcement of the law"—as it has done in this case—the "sensible balances" that Congress had in mind would never be achieved. Under the

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Appeals, 946 F. Supp. 1225, 1239-40 (E.D. Va. 1996) (granting TRO permitting church to serve meals to homeless, explaining, "Nor does such conclusory assertions constitute a compelling state interest, here, where there has been a showing of a substantial burden on the free exercise of religion. . . . Indeed, there was not even a showing that the number involved in the Meal Ministry exceeds the number of parishioners who attend services on Sunday."); *Rigdon v. Perry*, 962 F. Supp. 150, 162 (D.D.C. 1997) ("A politically-disinterested military, good order and discipline, and the protection of service members' rights to participate in the political process are compelling governmental interests, but the defendants have not shown how these interests are in any way furthered by the restriction on the speech of military chaplains."); *Collins-Bey v. Thomas*, No. 03 C 2779, 2004 WL 2381874, *4 (N.D. Ill. Oct. 25, 2004) ("As is clear from its text, RLUIPA requires the defendants to prove that the burden *on the particular person* 'is in furtherance of a compelling governmental interest.'") (emphasis in original);.

[5] *See, e.g.*, Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONT. L. REV. 145, 148 (1995); Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 40 (1994).

Government's analysis, sincere religious practice could never survive in the face of a generally applicable criminal law.[6]

Congress's decision to require a showing of need for the particular challenged application also helps make these cases amenable to judicial resolution. Under that approach, a court need not question the general congressional findings underlying a given federal law. Instead, the court need merely ask whether the findings apply strongly to the circumstances of the religious claimant–a fact-based inquiry that falls well within judges' competence and experience.

This, moreover, was an eminently sensible way for Congress to balance the purposes of other federal laws with its desire to keep those laws from burdening religion in particular applications. When a legislature enacts a general law, it is unlikely to inquire about specific cases of religious exercise, often because it is unaware of them. Just as the state's judgment in *Yoder* that education to age 16 was generally necessary did not constitute a finding that it was necessary for Amish children, Congress's general scheduling of DMT as a controlled substance does not–and could not–constitute a specific finding that hoasca (assuming the CSA applies to it at all) poses sufficient dangers when used in the form of the UDV sacramental tea and in the limited quantities and circumscribed circumstances of a UDV worship service. By requiring the Government to make the latter, more difficult showing, RFRA makes it possible to strike a "sensible balance" between freedom of religious practice and governmental needs.

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[6] Consequently, as Judge McConnell put it in an earlier scholarly work, "If there were no accommodations, the underlying legislation would become much more controversial and difficult to enact. Accommodations are a commonsensical way to deal with the differing needs and beliefs of the various faiths in a pluralistic nation." Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 694 (1992).

B. RFRA Requires The Government To Demonstrate Its Compelling Interest With Case-Specific Facts, Not With Reliance Upon General Congressional Findings.

For similar reasons, general congressional findings underlying the law in question cannot be conclusive or sufficient to defeat a RFRA challenge to an application of that law. In RFRA litigation, the Government must produce specific evidence of the compelling need to apply the law given the particular circumstances. The requirement of specific evidence and the insufficiency of general congressional findings are a corollary to the principle that RFRA requires an assessment of the Government's interest in applying the law in the individual case rather than in general.

The insufficiency of general findings is also clear from the way in which RFRA's text defines the Government's obligation to "demonstrat[e]" its compelling interest. Under the statutory definition, "demonstrates" means "meets the burdens of going forward with the evidence and of persuasion" (42 U.S.C. § 2000bb-2(3)–terms that are drawn from the law of evidence in litigation, not the law concerning congressional findings. *See* 389 F.3d at 1021 (McConnell, J., concurring) ("Congress contemplated the introduction of 'evidence' pertaining to the justification of 'application' of the law in the particular instance."). To make congressional findings conclusive would undercut this express statutory definition of the Government's obligation–just as it would undermine the textual requirement that the Government justify "application of the burden to the person" (*see supra* part I-A).

Looking beyond congressional findings to specific facts is, again, essential to achieving RFRA's purpose. Every RFRA case involves some other federal law whose importance the Government can be expected to emphasize. If RFRA "could be satisfied by citing congressional findings in the preambles to statutes, without additional evidence, RFRA challenges

would rarely succeed; congressional findings invariably tout the importance of the laws to which they are appended." *Id.* (McConnell, J., concurring). But RFRA is also a federal statute, of equal dignity with these other laws. And Congress intended that RFRA restrain the application of other federal laws when they impose burdens on religious exercise.

To achieve this goal, Congress set up a scheme relying on judicial fact-finding about the strength of government interests in the particular case. This, as we have noted, was Congress's chosen means for "striking sensible balances" between religious freedom and government interests. 42 U.S.C. § 2000bb(a)(5).

Congress, moreover, is free to change that approach on a statute-by-statute basis. If it wants to make specific findings that a given federal law serves a compelling interest in all its applications, it can do so and thereby "explicitly exclud[e RFRA's] application" to that law. 42 U.S.C. § 2000bb-3(a),(b).[7] Unless there is such an explicit exclusion, however, the regime of judicial factfinding, not reliance upon general congressional findings, governs under RFRA.

C. The Government Cannot Avoid Its Burden Under RFRA By Arguing That The Drug Laws Can Bear No Exemptions.

Despite RFRA's clear statutory requirements, the Government contends that the prosecution of UDV and its members is justified merely by the fact that Congress listed the hallucinogenic ingredient in hoasca as a controlled

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[7] We note that some state counterparts to RFRA contain exceptions for particular state laws–including an exception for state drug laws, FL. STAT. ANN. § 761.05(4), and at least one exception added after the original enactment of the state RFRA, 775 ILL. COMP. STAT. 35/30 (enacted 2003) (providing that nothing in Illinois' 1998 RFRA "limits the authority of the City of Chicago to exercise its powers under the O'Hare [Airport] Modernization Act for the purposes of relocation of cemeteries or the graves located therein").

substance under the drug laws—and the Government "has a compelling interest in the uniform enforcement" of the drug laws with respect to such substances. *See, e.g.,* Pet. Br. 16-28. But as discussed below, Congress itself apparently does not share this aversion to religious exemptions to the drug laws. Moreover, there is no reason to believe that such exemptions would cause the types of problems that the government fears.

1. First, although Congress certainly had the power to exempt the drug laws from RFRA's requirements, it has not done so. This is especially significant in light of RFRA's language. By its terms, RFRA's compelling interest standard, with its focus on the specific harm caused by the claimant's use, applies to "all cases where free exercise of religion is substantially burdened" (42 U.S.C. § 2000bb(b)(1)), and to "all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after [enactment of RFRA]," *unless* the law "explicitly excludes such application by reference to this chapter." 42 U.S.C. § 2000bb-3(a),(b). The CSA contains no such exception.

Indeed, if RFRA is to be given its plain meaning and achieve its basic purposes, the Court cannot accept the government's position that the CSA is a "comprehensive and closed regulatory scheme" that cannot "function consistent with a regime of religious exemptions." Pet. Br. 17, 16. If the government could succeed with that contention based on its showing here, then other statutes would likely be deemed inconsistent with any exemptions, and RFRA would be thoroughly undermined.

Moreover, the Government's argument is undercut by the terms of the Controlled Substances Act itself, which allows the Attorney General, "by regulation, [to] waive the requirement for registration of certain manufacturers, distributors, or dispensers *if he finds it consistent with the public health and safety.*" 21 U.S.C. § 822(d) (emphasis added). Relying on this provision, the Government has

exempted the use of peyote, a Schedule I substance, in Native American worship ceremonies. 21 C.F.R. § 1307.31 ("The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration."). Congress has also required states to allow the religious use of peyote by members of federally recognized Indian tribes. 42 U.S.C. § 1996a. Thus, as Judge McConnell pointed out in the court of appeals, "Congress's consistent position has been that concerns for religious freedom can sometimes outweigh risks that otherwise justify prohibiting Schedule I substances," and "[n]either Congress nor the Executive has treated the CSA's general findings about Schedule I substances as precluding a particularized assessment of the risks involved in a specific sacramental use." 389 F.3d at 1022 (McConnell, J., concurring).

In this regard, the Government's effort to distinguish the peyote exemption—based on "the federal government's unique relationship with" Indian tribes (Pet. Br. 27)—misses the point. Whatever special reasons justify accommodating Native American practices, the fact remains that the peyote exemption "indicates Congress's belief that at least some use of substances controlled by the [CSA] are 'consistent with the public health and safety.'" 389 F.3d at 1022 (McConnell, J., concurring) (quoting 21 U.S.C. § 822(d)). The Government points to no evidence that allowing ritual peyote use has created problems of abuse, trafficking, or enforcement.[8] Accordingly, there was every reason for the district court to take evidence about whether the limited ritual use of hoasca would also be free from serious dangers. Indeed, such an inquiry is mandated by RFRA, which calls for presumptive

[8] Serious harms from peyote have been absent even though sacramental peyote exemptions exist not only under federal law but have long existed under state law. See, e.g., *Employment Division* v. *Smith*, 494 U.S. 872, 890 (1990) (noting statutory exemptions); *infra* p. 18-19 (noting court decisions).

accommodation to avoid a substantial burden on *any* religious exercise, not just that of Native Americans.

2. The Government's assertion that "claims for religious exemptions, once recognized, would proliferate" (Pet. Br. 22) is both highly speculative and inadequate under RFRA. The various peyote exemptions have produced no proliferation of exemptions for sacramental drug use. And in any case, if the compelling interest test means anything, it forbids the Government to rely on such speculation.

In *Sherbert*, for example, the state argued that claims by religious objectors to work requirements might drain the unemployment compensation fund, but the Court rejected this concern as "no more than a possibility." 398 U.S. at 407. Similarly, the Court in *Yoder* dismissed the state's argument that Amish children would need additional education if they left the religious community, on the ground that the argument was "highly speculative" and unsupported by "specific evidence." 406 U.S. at 224. Even in the context of religious claims by prisoners, where there is a judicial "tradition of giving due deference to the experience and expertise" of administrators, the legislative history confirms that "mere speculation [or] exaggerated fears . . . will not suffice to meet the act's requirements." COMM. OF THE JUDICIARY, S. REP. NO. 103-111, *supra* p. 9, at 10

3. In relying on *Gonzalez* v. *Raich*, 125 S. Ct. 2195 (2005), for the proposition that any permitted drug use will inevitably expand to other uses (Pet. Br. 18), the Government shows its disregard for the burden of proof that the RFRA places on it. *Raich* assessed the Government's argument that home-grown medical marijuana would be diverted to illicit uses under the deferential rational basis standard, the polar opposite of the compelling interest standard mandated by RFRA. *See* 125 S. Ct. at 2208 ("We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding."). The

Raich majority, assessing the outer "scope of Congress's authority under the Commerce Clause," had only the "modest" task of assessing the rationality of regulating medical marijuana, and refused as in previous commerce power cases "to excise individual components of th[e] larger scheme." *Id.* at 2208-09.

The contrast with RFRA could scarcely be more clear. Rather than prescribing mere rationality review, Congress (acting within its unquestioned Article I powers to avoid federally imposed burdens on religion) crafted RFRA to require the federal government to satisfy the very non-deferential compelling interest test *and* directed that religious exercise be "excise[d]" from general statutory prohibitions through case-specific exemptions.

Moreover, the fact that other claims of sacramental drug use may be raised does not mean they must be accommodated. The Government suggests that it would be "'anomalously case-specific'" to exempt the UDV without also exempting other users of hoasca and even users of "other hallucinogens (such as marijuana and LSD)." Pet. Br. 20-21 (quoting *Bd. of Educ., Kiryas Joel Village School Dist.* v. *Grumet*, 512 U.S. 687, 703 (1994)). But making careful distinctions between the Government's interests in various cases is not anomalous or discriminatory; it is precisely the method employed by this Court in *Yoder* and *Sherbert*, the models for RFRA. *Yoder* protected the Amish from application of the general compulsory-education laws in the light of the evidence about the Amish alternative system of vocational training, a showing "that probably few other religious groups or sects could make." *Id.* at 236.[9] And

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[9] The *Yoder* Court's reference to the Amish parents' "convincing showing" is perfectly consistent with the ultimate burden of proof remaining on the Government–as RFRA's text requires in any event. Whoever bears the burden of proof, both sides present evidence about the relevant government interests. And the Amish evidence concerning the success of their informal vocational training defeated the state's attempt to show the necessity of burdening the Amish, notwithstanding the state's

Sherbert, in protecting Saturday worshippers from denials of unemployment compensation, expressly distinguished that case from one "in which an employee's religious convictions serve to make him a nonproductive member of society." 398 U.S. at 410.

Thus, if the Sante Daime sect's use of hoasca (Pet. Br. 21) is similar to the UDV's, and similarly circumscribed, then plainly any RFRA exemption would have to extend to that similarly situated group (*Kiryas Joel*, 512 U.S. at 703)–although even then we doubt that such a limited extension to another small sect would elevate the Government's interest to a compelling level. But the exemption need not be extended if the Sante Daime sect's use differs substantially from the UDV's use. Indeed, the district court found sufficient potential differences that it refused an attempt to intervene, holding that the cases should be litigated separately. J.A. 102-04. And certainly a ruling exempting hoasca need not extend to the use of drugs by other groups under other circumstances. The pre-*Smith* case law makes quite clear that courts are fully capable of appreciating these differences when applying the compelling interest test.[10]

4. Contrary to the Government's claim (Pet. Br. 24-26), the pattern of constitutional free exercise decisions before *Employment Division* v. *Smith* confirms that religious exemptions from controlled substance laws may be appropriate in some circumstances under the compelling interest test. The decisions the Government cites (Pet. Br. 25-26 n.13) are inapposite because the vast majority involved

generally strong interests in compulsory education. *See* 406 U.S. at 227 (ultimately requiring a "more particularized showing from the State" concerning the necessity of burdening the Amish).

[10] As explained at length in the Brief *Amicus Curiae* of Various Religious Organizations and Civil Rights Organizations in Support of repondents at 13-17, such different results, stemming from application of a consistent standard to different facts, do not transgress Establishment Clause values of neutrality among religions.

individuals who claimed a religious obligation to engage in continual consumption of marijuana or other drugs–a situation readily distinguishable from the UDV's use of hoasca in worship services, as the district court found. 282 F.Supp.2d 1236, 1253-54 (D.N.M. 2002).

The more relevant analogy to this case is Native Americans' sacramental use of peyote, which as we have noted is protected by statutory exemptions both under federal law and in many states, and which a number of courts have declared to be constitutionally protected under the compelling interest test. *See Smith* v. *Employment Division*, 763 P.2d 146 (Or. 1988), *rev'd on other grounds*, 494 U.S. 872 (1990); *Whitehorn* v. *State*, 561 P.2d 539 (Okla. Crim. App. 1977); *State* v. *Whittingham*, 504 P.2d 950 (Ariz. Ct. App.1973); *People* v. *Woody*, 394 P.2d 813 (Cal. 1964); *see also Peyote Way Church of God* v. *Smith*, 742 F.2d 193 (5th Cir. 1984) (reversing summary judgment upholding application of peyote laws to Native Americans). As we will show in part II (pp.26-28 *infra*), there was considerable evidence that hoasca as used by the UDV bears more resemblance to peyote as used by Native Americans than to marijuana as used by the Ethiopian Zion Coptic Church and other groups in the previous caselaw. The longstanding and repeated rejection of claims involving marijuana and LSD thus provides no precedent for refusing to consider an exemption in cases involving very different drugs and circumstances of use.

Contrary to the Government's suggestion, the Court's decision in *United States* v. *Lee*, 455 U.S. 252 (1982)[11], likewise does not support the Government's argument against considering case-specific exemptions in drug cases. *Lee* rejected the claim of Amish employers to opt out of the Social Security system on the ground that the duty to pay Social

[11] Congress later overturned the result of *Lee* with the enactment of 26 U.S.C.A. § 3127, which exempted the Amish from paying Social Security taxes.

Security taxes could not be distinguished in principled fashion from other cases where religious believers argued that "tax payments were spent in a manner that violates their religious belief." *Id.* at 260. Accordingly, "[u]nlike the situation presented in *Wisconsin v. Yoder*," recognizing the Amish exception would entail recognizing "myriad" other exceptions. *Id.* at 259-60. By contrast, the record of previous case law and statutory exemptions demonstrates that it is possible to make principled distinctions among sacramental uses of controlled substances that do and do not implicate a compelling interest.

Accordingly, the vast majority of pre-*Smith* decisions provide no support for the claim that religious exemptions from drug laws are per se improper. And nothing in the statutory language or its legislative history suggests approval of those few lower court decisions that might be read to suggest a per se approach. RFRA does not necessarily incorporate every previously decided free exercise case. As the legislative history makes clear, the statute "neither approves nor disapproves of the result in any particular court decision involving the free exercise of religion"; the statute "is not a codification of any prior free exercise decision but rather the restoration of the legal standard that was applied in those decisions." H.R. REP. NO. 108-88, 103d Cong., 1st Sess. 7 (1993); *accord* S. REP. NO. 103-11, 103d Cong., 1st Sess. 9 (1993). As is clear from RFRA's statement of purposes, 42 U.S.C. § 2000bb(b)(1), the compelling interest standard that the statute seeks to restore is that found in *Yoder* and *Sherbert*–which (as already noted) requires courts to look beyond the Government's statement that a law is important and must be uniformly enforced, and to ask whether exempting the particular claimant would undercut a compelling interest.[12]

[12] The legislative history further indicates Congress's intent to adopt the vigorous standard set forth in *Yoder* and *Sherbert* rather than any weaker versions of the compelling interest test. Congress debated whether to restore the standard in free exercise cases to the high water mark represented by *Yoder* and *Sherbert*, or to what some observers perceived as a more lenient standard applied in some decisions just prior to *Employment Division* v. *Smith*. As recognized by Representative Hyde in his statement accompanying the House Bill:

> The "compelling state interest" test as applied in *Sherbert* and *Yoder* . . . was far stronger than the court had been applying prior to *Smith*. Those two cases represent the zenith of free exercise jurisprudence, where religious plaintiffs who sought to have their individual claims balanced against government interests actually prevailed. In reality, in recent years it has been quite difficult, if not impossible, for plaintiffs bringing constitutional free exercise claims to prevail.

H.R. REP. NO. 108-88 at 15. The debate was resolved by including the specific reference to *Yoder* and *Sherbert* in the final Act, making clear Congress's intent to apply the rigorous standard represented in those decisions, and not a watered-down version of the compelling interest test. *See also* Berg, *supra* n.5, at 27 (noting "explicit textual statement of purpose incorporating the stronger standard of review reflected in *Sherbert* and *Yoder*").

What pre-RFRA case law shows is that courts are perfectly capable of drawing sensible lines, protecting religious freedom where possible while still upholding the Government's prohibition on controlled substances in many cases. This case law undermines the Government's assertion that district judges cannot "evaluate and comprehend fully the far-reaching implications for law enforcement that attend any decision to exempt a Schedule I substance from the CSA's rigorous controls." Pet. Br. 23. Even more important, Congress directly rejected this claim of judicial incompetence by finding, in enacting RFRA, that the compelling interest standard leading to case-by-case exemptions is a "workable test" for balancing religious freedom against governmental interests. 42 U.S.C. § 2000bb(a)(5). As Judge McConnell put it, whatever judges believe about their own competence, they "are not free to decline to enforce the statute, which necessarily puts courts in the position of crafting religious exemptions to federal laws that burden religious exercise without sufficient justification." 389 F.3d at 1020 (McConnell, J., concurring).

Thus the Government's suggestion that carving out a RFRA exemption from the drug laws would represent judicial activism is entirely backward. This case does not involve courts ordering an exception to an Act of Congress based on general language in the Constitution. It involves an exception to the Controlled Substances Act based on another Act of Congress that expressly calls for exceptions to federal statutes. The case involves two federal statutes, and each must be taken seriously. It is not judicial activism to read the two together and rely on one to create an exception to the other. Judicial activism would be refusing to enforce RFRA.

5. Finally, if the Government's generalized claims about judicial incompetence and the consequence of exemptions are accepted here, they could similarly be asserted "for application of RFRA to virtually any field of regulation." 389 F.3d at 1020 (McConnell, J., concurring). One could just as easily assert that allowing Amish children to pursue non-formal schooling will destroy compulsory education laws, or that judges cannot evaluate the consequences of such an exemption–which would overrule *Yoder*. Or one could assert that judges cannot evaluate whether recognizing religious objections to work rules has drained unemployment compensation funds–which would overrule *Sherbert*.

Similarly, if the Government's argument were accepted, one could use it as a basis for asserting that courts in the District of Columbia cannot evaluate evidence on the necessity of performing an autopsy on a Hmong or Orthodox Jew whose family object to the intrusion on religious grounds. *Cf. City of Boerne* v. *Flores*, 521 U.S. 507, 530-31 (1997) (noting the "emphasis" in RFRA's background on limiting such autopsies). Or one could assert that the sacramental use of wine at religious services would undercut the need for "uniform enforcement" of a ban on public serving of alcohol on a military base. *Cf. Corp. of the Presiding Bishop* v. *Amos*, 483 U.S. 327 (1986) (upholding religious exemption in Title VII).

All of these assertions would be belied by the facts, but they could be accepted if the Government's claims are accepted here. The logical conclusion of the Government's arguments for "uniform enforcement" is to undermine the premises of RFRA and destroy the statute's effectiveness.[13]

II. To Satisfy The Compelling Interest Test, The Government Must Show A Serious Harm, Based On Specific Evidence Rather Than Conclusory Statements.

The Court should also reject the Government's argument that, as an evidentiary matter, the lower courts imposed too high a standard for establishing a compelling interest. After hearing two weeks of testimony and conducting an extensive review of the evidence, the district court concluded that the evidence was "in equipoise" on whether the UDV's sacramental use of hoasca would create risks of harm to UDV members or diversion to non-religious uses. 282 F. Supp. 2d at 1262, 1266. The court held that when the evidence is

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[13] The same can be said of the Government's assertion that "inevitabl[y]," if there are exemption rulings, "the public will misread such rulings as indicating that a substance is not harmful, fueling an increase in its use." Pet. Br. 23. Not only is this prediction unsupported by any facts and therefore improperly speculative (see *supra* p. 16), but it could also be said of any exemption, including the peyote exemption for Native Americans (which as already noted has not been shown to have fueled any significant increased use). And the Government's argument would improperly subordinate the free exercise of religion by holding it hostage to public misperceptions about a Government decision permitting free exercise. *Cf. Widmar* v. *Vincent*, 454 U.S. 263, 276 n.14 (1981); *Board of Education* v. *Mergens*, 496 U.S. 226, 251 (1990) (both refusing to allow restrictions on private religious speech to be based on misperceptions that government endorses the speech, where government can simply correct any misperceptions). Compared with denying an exemption for a sincere, limited religious use, it would be a far less restrictive means of avoiding misperceptions for the Government to issue public statements explaining that exempting such a use does not imply that the substance may be used under other circumstances, or that it is wholly safe or is safe under other circumstances.

balanced and inconclusive in this way, the Government fails to meet its "onerous" and "difficult" burden under RFRA. *Id.* The court required the Government to prove not just some risk of these harms, but rather "a *serious* health risk to the members of the UDV" or a "*significant* diversion of the substance to non-religious use." *Id.* at 1255 (emphases added). The court of appeals likewise concluded that an equipoise of evidence fell short of meeting the Government's burden of proof. 389 F.3d at 992-93. Both courts were correct, both in their articulation of the applicable legal standards and in their application of those standards to the evidence (or non-evidence) presented by the Government below.

A. The Courts Below Articulated The Correct Legal Standards.

The strong showings required by the district court–"serious" health risks, "significant" likely diversion–are mandated by RFRA. The compelling interest test, after all, institutes "the most rigorous of scrutiny," *Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520, 546 (1993). As already noted, RFRA specifically adopts the compelling interest standard in *Yoder* and *Sherbert*. 42 U.S.C. § 2000bb(b)(1). Under those decisions, "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion" (*Yoder*, 406 U.S. 215). Put another way, only "the gravest abuses, endangering paramount interest, give occasion for permissible limitation" of religious observance. *Sherbert*, 374 U.S. at 406 (quoting *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945)).

This does not mean that protection under RFRA is absolute. Both *Yoder* and *Sherbert*, while ruling for the religious claimant, recognized that some other religious objections to compulsory-education or unemployment-compensation laws would be overridden by a compelling interest. *See Yoder*, 406 U.S. at 235-36 (distinguishing Amish from other groups that

could not show a similar adequacy of their educational alternative); *Sherbert*, 374 U.S. at 410 (distinguishing Saturday observer from employee whose "religious convictions serve to make him a nonproductive member of society"). Again, the statutory findings speak of "striking sensible balances" between religious freedom and government interests. 42 U.S.C. § 2000bb(a)(5).

Nevertheless, under the compelling interest test, the Court weighs this balance with its thumb decidedly on the side of religious freedom. The Government must demonstrate "some *substantial* threat to public safety, peace, or order" from exempting the claimant. *Yoder*, 406 U.S. at 230 (emphasis added) (quoting *Sherbert*, 374 U.S. at 403. As already noted (p. 16 *supra*), speculative predictions unsupported by specific evidence will not show that the interest is compelling or the threat substantial.

Moreover, the requirement of seriousness must apply not only to the ultimate harm but to the risk that it will occur. Exempting the claimant in question will almost always produce some increased risk of the harm that the Government fears. If even a small or uncertain increased risk is deemed sufficient to implicate a compelling government interest, the statute will be stripped of any force. The terms used by the district court are entirely appropriate in this context: not only the harm to the Government's interests, but also the risk that the harm will occur, must be "serious" and "significant."

A strong standard is especially appropriate here given the severity of the threatened burden on the UDV: the loss of the ability to engage in a ritual act of worship that is central to its members' faith. If the purpose of RFRA is to "strik[e] sensible balances between religious liberty and . . . governmental interests" (42 U.S.C. § 2000bb(a)(5)), a severe burden such as this demands a strong showing to justify it. *See, e.g., Yoder*, 406 U.S. at 227 (requiring "a more particularized showing from the State . . . to justify the severe interference with [Amish families'] religious freedom").

B. The Courts Below Correctly Applied Those Standards To The Record Here.

We leave to the parties a detailed review of the district court's findings on the risks of harm posed by the UDV's religious use of hoasca, as well as its finding that the evidence about those alleged harms was in equipoise. The district court's findings are supported by the record, and because they are findings of fact, the issue on appeal is only whether they are clearly erroneous. *See* FED. R. CIV. P. 52(a).[14]

As the district court found, the UDV's hoasca use differs significantly from the religious use of marijuana by the Ethiopian Coptic Church and similar groups that lower courts have often refused to exempt under the compelling interest test and shares significant features with the sacramental use of peyote that courts have often exempted under the test. The Ethiopian Coptic Church advocated the use of marijuana "continually all day, through church services, through everything [they] do." *Olsen* v. *Drug Enforcement Admin.*, 878 F.2d 1458, 1459 (D.C.Cir. 1989); *see also, Olsen* v. *Iowa*, 808 F.2d 652, 653 (8th Cir. 1986). As Judge McConnell noted in his concurring opinion to the en banc decision below: "The constant and uncircumscribed use of a drug presents different health risks and risks of diversion than the use of hoasca suggested by UDV." 389 F.3d at 1020. Similarly, in

[14] To be sure, the ultimate question whether evidence that is "virtually balanced" meets RFRA's legal standard is an issue of law reviewed de novo. However, as we have just discussed, the district court and court of appeals were correct in their legal determination that an equipoise of evidence does not meet the Government's onerous burden under RFRA.

By contrast, the question to what extent the UDV's use would actually undercut the Government's generalized interest is a question of fact. Whether the UDV's hoasca use will cause physical or psychological harm or be diverted to other uses are quintessential fact questions. As the district court's opinion shows, 282 F. Supp. 2d at 1254-69, these questions turn heavily on the interpretation of studies and other data and the evaluation of witnesses' credibility, especially the conflicting expert witnesses. Such matters are left primarily to the district court, and there is no reason to overturn the findings that the court made here.

United States v. *Brown*, the Eighth Circuit found that the "broad use" of marijuana by a member of a religious organization named "Our Church," which included supplying the drug to anyone who wanted it, including children, made accommodation impossible. No. 95-1616, 1995 WL 732803 at *2 (8th Cir. Dec. 12, 1995).

By contrast, both Congress and the courts have responded differently to religious groups that seek the right to use peyote in small and carefully monitored amounts, *Whittingham,* 504 P.2d at 953; *Peyote Way Church of God,* 742 F.2d at 196, as part of a "precisely circumscribed ritual," *Olsen* v. *Drug Enforcement Admin.,* 878 F.2d at 1464, and that prohibit its use outside the religious ritual, *Peyote Way Church of God,* 742 F.2d at 196. Moreover, there is extensive traffic in marijuana, but not in peyote or in hoasca. *Olsen* v. *Drug Enforcement Admin.*, 878 F.2d at 1463.

The district court's reliance upon these distinctions and its conclusion that an exemption for the UDV's use of hoasca would not create sufficiently serious risks to satisfy the standards of RFRA was well supported by the evidence below. Specifically, there was evidence to show that in the form of hoasca tea, the DMT substance creates no serious physical or psychological harm (282 F. Supp. 2d at 1255-62); that hoasca lacks a significant potential for abuse because (like peyote) it is unpleasant to ingest (*id.* at 1264-65); that the UDV monitors the use of hoasca, prohibits use outside the ceremony, and would likely cooperate in preventing diversion to other uses (*id.* at1265-66); and that, like the peyote groups, the UDV has in fact increased the responsible behavior of its members. *Id.* at 1262; *see also Woody*, 394 P.2d at 818; *Town v. State*, 377 So. 2d 648, 651 (Fla. 1979); *Commonwealth v. Nissenbaum*, 536 N.E.2d 592, 595 (Mass. 1989).

Although there was also evidence pointing the other way, these factors clearly support the district court's finding that the Government had shown no more than an equipoise of

evidence on the likely harm from the UDV's use of hoasca tea. Such equipoise simply cannot establish the "interests of the highest order" or "gravest abuses, endangering paramount interests" that the Government is required to demonstrate under RFRA.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

APPENDIX

STATEMENT OF INTEREST OF *AMICI CURIAE*

Advocates for Faith & Freedom

Advocates for Faith & Freedom is a non-profit public interest law firm that is dedicated to the preservation, promotion, and defense of religious liberty. Its counsel has been involved in numerous past and present cases that concern the right of persons and entities to be free to exercise their faith through speech and conduct. Advocates for Faith & Freedom is presently counsel of record in three cases before the Ninth Circuit Court of Appeal that concern religious speech and exercise. Advocates for Faith & Freedom is also involved in numerous cases that concern the application of the strict scrutiny standard as implicated by the federal Religious Land Use and Institutionalized Persons Act and the First Amendment to the United States Constitution. Therefore, Advocates for Faith & Freedom has a particular interest in the Court's interpretation and application of the strict scrutiny standard.

Agudath Israel of America

Agudath Israel of America is a national Orthodox Jewish organization. Among its other activities, Agudath Israel advocates for the rights and interests of religiously-observant Jews. Agudath Israel has been an active member of the Coalition for the Free Exercise of Religion, and has been a strong supporter of RFRA and other similar legislative initiatives designed to provide broad free exercise protection. Religiously observant Jews across the country have a direct stake in ensuring that RFRA remains a potent protection for religious liberty.

The American Civil Liberties Union

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 400,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Since its founding in 1920, the ACLU has sought to preserve religious freedom through its defense of both the Free Exercise and Establishment Clauses. In furtherance of that goal, the ACLU has appeared before this Court in numerous religion cases, both as direct counsel and as *amicus curiae.* The ACLU also supported enactment of RFRA, whose proper interpretation is at issue in this case.

Americans for Religious Liberty

Americans for Religious Liberty (ARL) is a nonprofit, public interest, educational organization founded in 1982. ARL is dedicated to defending religious freedom, freedom of conscience, and the constitutional principle of separation of church and state. To preserve these values, ARL's supporters believe RFRA's compelling interest test should be applied by its terms in the statute. ARL has participated as an *amicus* in a number of cases before this Court.

The Baptist Joint Committee

The Baptist Joint Committee (BJC) is a religious liberty organization serving fourteen cooperating Baptist conventions and conferences in the United States. BJC deals exclusively with religious liberty and church-state separation issues and believes that vigorous enforcement of both the Establishment and Free Exercise Clauses is essential to religious liberty for all Americans. Since BJC strongly supported its enactment in 1993, RFRA has become a lynchpin of protection for religious liberty from federal interference. The Government's position threatens to seriously weaken that protection.

The Christian Legal Society

The Christian Legal Society, founded in 1961, is a nonprofit interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and at over 140 accredited law schools. Since 1975, the Society's legal advocacy and information division the Center for Law and Religious Freedom, has worked for the protection of religious belief and practice, as well as for the autonomy from the government of religion and religious organizations, in the Supreme Court of the United States and in state and federal courts throughout this nation.

The Center strives to preserve religious freedom in order that men and women might be free to do God's will. Using a network of volunteer attorneys and law professors, the Center provides information to the public and the political branches of government concerning the interrelation of law and religion. Since 1980, the Center has filed briefs *amicus curiae* in defense of individuals, Christian and non-Christian, and on behalf of religious organizations in virtually every case before the Supreme Court involving church/state relations.

The Society is committed to religious liberty because the founding instrument of this Nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive, Declaration of Independence (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which is religious liberty. The right sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but only in the sense that it is recognized in and

protected by the U.S. Constitution. Because the source of religious liberty, according to our Nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty that to protect inviolate its full and free exercise. Hence, the unequivocal and non-negotiable prohibition attached to this, our First Freedom, is "Congress shall make no law..."

The Christian Legal Society's national membership, years of experience, and available professional resources enable it to speak with authority upon religious freedom matters before this Court.

The First Church of Christ, Scientist, in Boston, Massachusetts

The First Church of Christ, Scientist, in Boston, Massachusetts was founded by Mary Baker Eddy in 1879 with a healing mission that embraces humanity by promoting the religion of Christian Science throughout the world. Local Christian Science branch churches exist throughout the United States and in almost 90 other countries. Although The First Church of Christ, Scientist supports the legal arguments made in this amicus brief, neither the Church nor the theology of Christian Science supports the use of drugs or any other material substances as an aid or pathway to spirituality or a greater understanding of God.

The General Assembly of the Presbyterian Church (U.S.A.)

Clifton Kirkpatrick, as Stated Clerk of the General Assembly, is the senior continuing officer of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is a national Christian denomination with nearly 2.5 million

members in more than 11,500 congregations, organized into 173 presbyteries under the jurisdiction of 16 synods. Through its antecedent religious bodies, it has existed as an organized religious denomination within the current boundaries of the United States since 1706. The General Assembly is the highest legislative and interpretive body of the denomination and the final point of decision in all disputes. As such, its statements are considered worthy of the respect and prayerful consideration of all the denomination's members. The General Assembly does not claim to speak for all Presbyterians, nor are its deliverances and policy statements binding on the membership of the Presbyterian Church.

The General Assembly of the Presbyterian Church (U.S.A.) has, since the effective date of the Religious Freedom and Restoration Act, vigorously supported the protections of the religious freedom afforded by the Act. It urges this Court to continue to protect religious freedom in the United States by applying the Religious Freedom Restoration Act requirement that the government prove that application of a substantial burden on religious exercise furthers a compelling governmental interest and does so by the least restrictive means. The Stated Clerk does not make any claim to determine whether or not the facts in this case involve a compelling governmental interest promoted by the least restrictive means.

The Holy Spirit Association for Unification of World Christianity (HSA)

The Holy Spirit Association for Unification of World Christianity (HSA), commonly known as the Unification Church, is a religious organization active throughout the United States. HSA seeks to preserve the fullest constitutional and statutory religious freedoms of its members. It desires that the Religious Freedom Restoration (RFRA) Act be interpreted to provide the broadest protection of freedom

possible. As this case involves the interpretation of the RFRA and the standards of strict scrutiny, HSA's interests are directly affected.

Institute on Religion and Public Policy

The Institute on Religion and Public Policy is a non-profit, non-partisan organization dedicated to researching and promoting cooperation between adherents of diverse religions, ethical norms, and political commitments. The Institute seeks to provide a trusted, balanced forum where Democrats and Republicans, liberals and conservatives, Protestants and Catholics, Jews and Muslims -- in short, people of all faiths and beliefs -- can come to an understanding and plan of action on issues of common concern.

The Institute operates on the premise that all people have the right to express their religious beliefs immune from public or private coercion. Accordingly, the Institute is committed to preserving a safe sphere for religious expression, and therefore opposes the Government's effort to weaken RFRA's compelling interest test in this case.

Liberty Counsel

Liberty Counsel has a keen interest in the preservation and protection of the free exercise of religion as an organization whose mission is to provide pro bono legal defense to those whose free exercise rights have been violated. Founded in 1989, Liberty Counsel has offices in Florida and Virginia and hundreds of affiliates in all fifty states. Liberty Counsel has argued before the United States Supreme Court on significant constitutional issues and has filed numerous briefs and represented many houses of worship under the Religious Land Use and Institutionalized Persons Act, which parallels in many ways the federal RFRA. Liberty Counsel has also

represented many individuals who have had their freedom of religion infringed upon and receives calls daily from such individuals seeking pro bono representation to protect the free exercise of their religion. As part of the original coalition urging passage of RFRA, Liberty Counsel has an interest in seeing an expansive definition and application of RFRA.

Minaret of Freedom Institute

The Minaret of Freedom Institute (MFI) is a Muslim policy research organization with a four-fold mission: to counter distortions about Islam, to show the origins of modern values that emerged from Islamic civilization, to educate both Muslims and non-Muslims on the importance of liberty and free markets, and to advance the status of Muslims worldwide. MFI's interest in the instant case stems from our commitment to the cause of liberty and from our concern for the religious freedom and status of Muslims.

MFI is concerned that the position advocated by the Government will set a precedent that, if followed, will emasculate the concept of religious liberty. One of the first casualties of a watered down compelling interest test will be the religious freedom of Muslims. Muslim prisoners, for example, may be forced to choose between eating pork products and starving. Practices culturally offensive to Muslims but inoffensive to non-Muslims, such as partial nudity, may be imposed not only on prisoners but on applicants for federal identification cards. If the Government prevails, all of this may be accomplished without any showing of a compelling governmental interest and with no effort to satisfy the government's interest in the least restrictive manner.

The National Association of Evangelicals

The National Association of Evangelicals (NAE) is a nonprofit association of evangelical Christian denominations, local churches, organizations, institutions, and individuals that includes more than 50,000 local churches from 51 denominations, as well as over 250 other religious ministries. NAE serves a constituency of over twenty million people. The Association believes that religious freedom is a gift of God and vital to the limited government which is our American constitutional republic. NAE believes the Government's position in this case would render RFRA largely impotent to protect sincere religious practice from federal interference.

The Peyote Way Church of God

The Peyote Way Church is a diverse organization whose sacrament is the endangered cactus species, peyote (botanical name *lophophora williamsii*). This plant is on the controlled substances list, and its religious use is federally restricted to Native American members of the Native American Church. As federal restrictions of sacramental plants intimately affect our church, we support the Respondents in this argument. The Peyote Way Church maintains that the government has no right to interfere with an individual's spiritual development, yet the emasculation of RFRA that the Government asks this Court to effect would allow precisely that result.

Queens Federation of Churches

The Queens Federation of Churches, Inc., was organized in 1931 and is an ecumenical association of Christian churches located in the Borough of Queens, City of New York. It is governed by a Board of Directors composed of equal number of clergy and lay members elected by the delegates of member congregations at an annual assembly meeting. Over 390 local churches representing every major Christian

denomination and many independent congregations participate in the Federation's ministry. The Queens Federation of Churches has appeared as amicus curiae previously in a variety of actions for the purpose of defending religious liberty. The Queens Federation of Churches and its member congregations are vitally concerned for the protection of the principle and practice of religious liberty. Accordingly, the Federation supports RFRA's purpose of requiring the federal government to establish a compelling governmental interest, and no less restrictive alternative, when it wishes to apply a law or regulation substantially to interfere with religious practice.

Sikh Coalition

Representing the interests of the North American Sikh community, the Sikh Coalition seeks to safeguard the civil and human rights of all citizens as well as to promote the Sikh identity and to communicate the collective interests of Sikhs to civil society. The Coalition serves as source of information on Sikhs and Sikh concerns for governments, organizations, and individuals. Ensuring the free exercise of religion for all people is a key tenet of the Sikh faith and is strongly promoted by the Coalition. The Coalition regards RFRA as a hedge of protection for Sikhs, one that would be largely destroyed if the Court adopts the Government's position.

Union For Reform Judaism

The Union for Reform Judaism (URJ) is the congregational arm of Reform Jewry, comprising 850 synagogues with a membership of over 1.5 million Jews in the United States. For the over one hundred years of its existence, the URJ has been a passionate advocate for protecting and strengthening the religion clauses of the First Amendment as the indispensable tools for preserving religious liberty. As Jews, we have long shared in and

benefited from America's unparalleled tradition of religious freedom. After centuries of harassment and persecution in every corner of the globe, we understand and appreciate that for more than two centuries, America's tradition of religious freedom has been a tremendous gift to people of faith. For us, and so much of American Jewry, the struggle to protect religious liberty, to ensure that we, and our neighbors, are free to follow the dictates of our conscience, is a core issue. We have, therefore, participated as amicus in nearly every major religious liberty case before the Court.